



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 294

RIN 0596-AD51

Special Areas; Roadless Area Conservation; National Forest System Lands in

Alaska

AGENCY: Forest Service, (Agriculture) USDA.

ACTION: Notice of proposed rulemaking; request for comment

SUMMARY: On January 20, 2021, President Biden ordered all executive departments and agencies to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations during the last 4 years that may conflict with protecting the environment, and to immediately commence work to confront the climate crisis (Executive Order 13990). In addition, on January 26, 2021, President Biden directed all Federal agencies to review tribal consultation policies and practices and recommit to more robust nation-to-nation relationships and respect for our Federal trust responsibilities. Consistent with these Presidential directives, the U.S. Department of Agriculture (USDA or Department), proposes to repeal a final rule promulgated in 2020 that exempted the Tongass National Forest (Tongass or the Forest) from the 2001 Roadless Area Conservation Rule (2001 Roadless Rule). The 2001 Roadless Rule prohibited timber harvest and road construction or reconstruction within designated Inventoried Roadless Areas, with limited exceptions. Repealing the Subpart E exemption would reinstate application of the 2001 Roadless Rule to the Tongass (as provided for in the U.S. District Court for the District of Alaska's Judgment in *Organized Village of Kake v. USDA*). USDA invites written comments on the proposed rule and

associated documents. Substantive comments received during the comment period will be considered in developing the final rule.

DATES: Written comments must be received or postmarked by January 24, 2022.

ADDRESSES: You may send comments by any of the following methods:

- ***Preferred:*** Federal eRulemaking Portal www.regulations.gov.
- Mail: Alaska Roadless Rule, USDA Forest Service, P.O. Box 21628, Juneau, Alaska 99802–1628.
- Hand Delivery / Courier: Alaska Roadless Rule, USDA Forest Service, 709 W. 9th Street, Juneau, Alaska 99802.
- Email: sm.fs.akrdlessrule@usda.gov.

All comments received will be posted to www.regulations.gov, including any personal information provided. The public may inspect comments received at www.regulations.gov. Do not submit any information you consider to be private, Confidential Business Information (CBI), or other information, the disclosure of which is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Joe Krueger, Interdisciplinary Team Leader, at 202-649-1189. Individuals using telecommunication devices for the deaf/hard-of-hearing (TDD) may call the Federal Information Relay Services at 1-800-877-8339, 24 hours a day, every day of the year, including holidays. You may also review information related to this rulemaking at the following website:

www.fs.usda.gov/project/?project=60904.

SUPPLEMENTARY INFORMATION:

Background

The Tongass is 16.7 million acres and stretches roughly 500 miles northwest from Ketchikan to Yakutat, Alaska. It includes approximately 80 percent of the land area in Southeast Alaska. The Southeast Alaska region has about 75,000 people living in more

than 30 towns and villages located in and around the Forest, most of which are located on islands or along the narrow coastal strip. The Tongass supports thriving ecosystems that provide food security, as well as cultural, spiritual, and socio-economic values to the surrounding communities. What is now known as the Tongass is the traditional homelands of the Tlingit, Haida, and Tsimshian peoples, and is essential to the Alaska Native customary and traditional way of life. Their health, well-being, identity, and worldview are intertwined with the lands, waters, and wildlife of the Tongass.

The Tongass contains large areas of essentially undisturbed forest lands, which represent increasingly scarce and, therefore, increasingly valuable ecosystems. A significant portion of these undisturbed forest lands include the 9.37 million acres of land that were administratively designated as Inventoried Roadless Areas in the 2001 Roadless Rule. Roadless areas are important because of their wildlife and fish habitat, recreation values, importance to multiple economic sectors, inherent passive use values, traditional properties and sacred sites for local indigenous people, and the ecosystem service values they provide, and the Tongass is no exception (Final Environmental Impact Statement (FEIS) for the 2020 Alaska Roadless Rule). The Tongass, along with adjacent areas in Canada, represents the largest intact tract of coastal temperate rainforest on earth, and it contains nearly a third of all old-growth temperate rainforests left in the world. This ecosystem is nationally and globally significant for its ability to sequester carbon in support of a resilient climate and is seen as a critical resource to retain intact in our changing climate. The Tongass holds more biomass per acre than any other rainforest in the world and stores more carbon than any other national forest in the United States. Large old-growth trees in the Tongass are critical for carbon sequestration, addressing the climate crisis, and maintaining the productivity and health of the region's fisheries and fishing industry.

The Tongass is also home to more than 300 mammal and bird species, as well as five species of salmon that return to spawn in the Tongass each year. One important feature of roadless areas is their biological value. Roadless areas are considered high in biological value if they contain a diversity of plant and animal communities, old-growth forests, and/or habitat for threatened, endangered, or sensitive species or wide-ranging species that are dependent on large, undisturbed tracts of land. On the Tongass, roadless areas support biological diversity especially associated with old-growth habitats, sensitive species, endemic species, and the wide-ranging predators of Southeast Alaska.

In addition, the fish and wildlife on the Tongass are of exceptionally high importance for traditional and customary uses, subsistence, recreation, and the economic well-being of the residents and visitors of Southeast Alaska. The Tongass offers large tracts of old growth forest that provide for some of the most productive fishing and hunting areas in the world. In 2018, the tourism and fishing industries combined accounted for 26 and 21 percent of Southeast Alaska's employment and earnings, respectively. Nature-based tourism generates substantial revenues in the region. For example, a 2009 survey of companies in Sitka, Juneau, Chichagof Island, Prince of Wales Island, Petersburg, and Wrangell identified an estimated \$277 million generated in annual direct business revenues. In November 2020, numbers released by the U.S. Bureau of Economic Analysis highlighted the importance of Alaska's outdoor recreation industry (3.9 percent of state GDP in 2019) as one of the highest percentages in the country.

In 2018, an estimated 185 million pounds of seafood was harvested in Southeast Alaska with a value of \$247 million. Viewed in terms of market value, salmon accounted for more than half (55 percent) of the total commercial catch in Southeast Alaska. Employment in the seafood harvesting and processing sectors remains relatively stable from year to year, despite the fluctuations in the volumes and value of salmon harvested each year. Salmon harvesting employed an estimated 864 people in Southeast Alaska in

2018, with an additional 1,281 people employed harvesting other fish. Wild Pacific salmon originating from streams and lakes within the Tongass' boundaries account for an estimated 75 percent of all commercially harvested salmon (Johnson et al. 2019). These fish support fishing and processing jobs for thousands of local residents and nonresidents.

The Tongass includes high-value, intact watersheds that were designated to be managed for intact ecological values and aquatic habitat productivity. In addition to commercial fisheries, subsistence marine resources are integral to life in Southeast Alaska. Marine resources, including fish, mammals, and plants, account for more than half of total per capita harvest in all Southeast Alaska communities, ranging from 55 percent in Tenakee Springs to 88 percent in Skagway. Salmon, trout, char, and eulachon (hooligan) are harvested in subsistence fisheries and for personal use by local residents. Salmon and trout are also the basis of tourism and guided fisheries enjoyed by thousands of visitors, supporting hundreds of tourism and related businesses.

Timber and mining, as well as other multiple uses on the Tongass, support businesses and jobs in Southeast Alaska. In 2018, timber and mining supported 3 and 5 percent of employment and earnings, respectively in the region. A number of small businesses rely on timber for local community consumption, and wood from the forest also supports cultural uses such as totem poles, canoes and tribal artisan use. Tongass National Forest-related employment in logging and sawmilling declined from 199 jobs in 2003 to a low of 62 jobs in 2018. Factors contributing to the decline include changes in the structure of the Alaska forest sector, macroeconomic conditions both in the United States and overseas (e.g., shifting demand from Asian markets), markets for Alaskan products, and conditions faced by Alaska's competitors. In addition, Alaska faces competitive challenges due to its remote location: the high costs of harvesting and transportation in remote areas of Southeast Alaska and the relatively lower price commanded in dimensional lumber markets limits profitability (Daniels et al. 2016). The

timber industry remains an important part of the economy for the rural communities of Southeast Alaska and is in the midst of a transition from old growth harvest to young growth harvest. The young-growth transition strategy as described in the 2016 Tongass Forest Plan Record of Decision (ROD) defines a 16-year period in which the old-growth contribution to the projected timber sale quantity decreases over time as young growth matures and becomes more economical to harvest. The analyses in the FEIS for the Alaska Roadless Rule (USDA Forest Service 2020) considered the continuation of the young-growth transition strategy in all alternatives analyzed. The Department and Forest Service are committed to investing in new opportunities through the Southeast Alaska Sustainability Strategy that will support the transition, including continuing investments in developing young growth opportunities. Mining activity on the Tongass has also continued to support jobs and economic opportunity.

The Tongass supports traditional and cultural uses that are central to the way of life for Alaska Native peoples, who have engaged in these uses for thousands of years. Living off the land is at the core of Alaska Native peoples' culture. For Native people, this tie to place and the harvest, trade, and use of traditional foods are key elements in fostering Native cultural identity (Alaska Native Heritage Center 2014). In more recent history, non-Native people living in rural Alaska have also come to rely on natural resources for their livelihoods (Office of Subsistence Management 2016).

Legal and Regulatory History

There is a long regulatory and litigation history concerning roadless area management on the Tongass. On January 12, 2001, the Department published the Roadless Area Conservation Rule (2001 Roadless Rule (66 FR 3243 and 66 FR 3272, January 12, 2001)). The 2001 Roadless Rule sought to conserve roadless area characteristics by prohibiting timber harvest and road construction and reconstruction with limited exceptions (including to protect public health and safety, provide access to

existing rights or leases, prevent or repair natural resource damage, maintain or restore ecosystem characteristics, or improve habitat for certain species).

During the development of the 2001 Roadless Rule, the Forest Service analyzed an alternative that would have exempted the Tongass from the Rule's application, but in the final rulemaking, in recognition of the multiple values of roadless areas on the Tongass, the Department applied the rule to the Tongass. In 2003, the Department reversed that decision and exempted the Tongass from the 2001 Roadless Rule (68 FR 75136, December 30, 2003). The 2003 rulemaking was later overturned by the U.S. District Court for the District of Alaska and the 2001 Roadless Rule was reinstated on the Tongass (with special instructions) see *Organized Village of Kake v. USDA*, 1:09-cv-00023 JWS (D. Alaska filed May 24, 2011). That decision was appealed by the State of Alaska, but ultimately the District Court's ruling was upheld by the U.S. Court of Appeals for the Ninth Circuit and the Supreme Court declined further review. See *Organized Village of Kake v. USDA*, 795 F.3d 956 (9th Cir. 2015) (*en banc*) *cert denied sub. nom Alaska v. Organized Village of Kake, Alaska*, 577 U.S. 1234 (2016).

Following the reinstatement of the 2001 Roadless Rule on the Tongass in 2011, the State of Alaska filed a new lawsuit in the U.S. District Court for the District of Columbia challenging the legality of the 2001 Roadless Rule, both nationwide and as applied within Alaska. Ultimately, the District Court ruled that the State had not shown that USDA violated any federal statute in promulgating the Roadless Rule, see *Alaska v. USDA*, 273 F.Supp. 3d 102 (D.D.C. 2017). The State appealed the ruling, but the appeal was subsequently held in abeyance (temporarily placed on hold) pending resolution of the State's rulemaking petition discussed immediately below. Following promulgation of the 2020 Rule, the government filed a motion with the D.C. Circuit to dismiss the appeal and vacate the underlying District Court ruling on the basis of mootness. On November 16, 2021, the D.C. Circuit dismissed the State of Alaska's challenge to the 2001 Roadless

Rule directing that Alaska's claims regarding application of the Roadless Rule to the Tongass National Forest be dismissed as moot and those portions of the district court's decision regarding the Tongass be vacated; and the remaining claims on appeal (regarding the Chugach National Forest) be dismissed for lack of standing, see *State of Alaska v. USDA*, No. 17-5260 (D.C. Cir.).

On January 19, 2018, the State of Alaska submitted a rulemaking petition to Secretary of Agriculture Sonny Perdue pursuant to the Administrative Procedure Act (APA). In the petition, the State requested that USDA consider creation of a state-specific rule to exempt the Tongass from the 2001 Roadless Rule and conduct a forest plan revision for the Forest. In June 2018, Secretary Perdue accepted the State's petition and agreed to review the State's concerns on roadless area management. The Secretary directed the Forest Service to move forward with a state-specific roadless rule. The Secretary did not commit to the State's request for a forest plan revision. A proposed state-specific rule and draft environmental impact statement were issued in October 2019. An FEIS was released in September 2020 and the final rule exempting the Tongass was published on October 29, 2020 (85 FR 68688, part 294 of Title 36 of the Code of Federal Regulations subpart E). That rule will be referred to as the "2020 Alaska Roadless Rule."

The FEIS for the 2020 Alaska Roadless Rule analyzed six alternatives for managing roadless areas on the Tongass. The following is a brief description of the action alternatives evaluated in the FEIS for the 2020 Alaska Roadless Rule (Chapter 2 of the FEIS contains a complete description of the alternatives):

The application of the 2001 Roadless Rule to the Tongass was analyzed as Alternative 1 (which at the time maintained the regulatory status quo, also known as the no action alternative).

Alternative 2 provided limited additional timber harvest opportunity while maximizing Inventoried Roadless Area designations.

Alternative 3 provided moderate additional timber harvest opportunities by making timber harvest, road construction, and road reconstruction permissible in areas where roadless characteristics have already been substantially altered and in areas immediately adjacent to existing roads and past harvest areas. Alternative 3 also established a Community Priority category to allow for small-scale timber harvest and associated road construction and reconstruction.

Alternative 4 provided substantial additional timber harvest opportunity while maintaining inventoried roadless designations for areas defined in the Tongass Forest Plan as Scenic Viewsheds, T77 Watersheds, and The Nature Conservancy/Audubon Conservation Priority Areas.

Alternative 5 provided maximum additional timber harvest opportunity by removing 2.32 million acres from Inventoried Roadless Area designation.

Alternative 6 fully exempted the Tongass from the 2001 Roadless Rule, removing 9.37 million acres from roadless area designation.

Taken together, the six alternatives represented the spectrum of potential management regimes identified to the Forest Service in public comments, public meetings, consultations with Tribal and Alaska Native corporations, and by cooperating agencies.

Approximately 411,000 comments were received during the development of the Alaska Roadless Rule. The “large majority of comments supported retaining the 2001 Roadless Rule and opposed the full exemption.” (85 FR 68697).

In addition, nine Southeast Alaska Tribal governments submitted a petition to the Secretary on July 21, 2020 requesting that the United States government commence a new rulemaking in collaboration with Tribal signatories to create a Traditional Homelands Conservation Rule to identify and protect traditional and customary uses of the Tlingit, Haida, and Tsimshian peoples in the Tongass. This petition also requested

that USDA create a new process for engaging in consultation with Tribes based on the principle of “mutual concurrence.” The petition states that it was submitted in response to the Tribes’ experience in the 2020 Alaska Roadless Rulemaking process and their belief that their contributions were not being adequately considered. Since the initial submission of the Traditional Homelands petition, three additional tribes joined as signatories.

After reviewing the alternatives and considering the comments, the Secretary issued 36 CFR part 294, Subpart E (85 FR 68688) on October 29, 2020 (Subpart E), selecting Alternative 6 and fully exempting the Tongass from application of Subpart B of 36 CFR part 294 (the 2001 Roadless Rule).

On December 23, 2020 a coalition of twenty-two plaintiffs, including five federally recognized tribes, two ecotourism companies, and other cultural and environmental organizations filed a complaint in the U.S. District Court for the District of Alaska challenging the 2020 Alaska Roadless Rule. decision. *Organized Village of Kake v. Vilsack*, No. 1:20-cv-00011.

Rationale for the Proposed Rule

USDA has the discretion to determine how to manage inventoried roadless areas. Fundamentally, the choice of how to best conserve and manage inventoried roadless areas is an exercise of USDA’s delegated authority for management of the renewable surface resources of the National Forest System in a multiple-use and sustained-yield context. Or as stated in the preamble of the 2020 final rule “roadless area management ... is fundamentally an exercise in discretion and policy judgement concerning the best use of the NFS lands and resources...” (85 FR 68691).

No statute compels or prohibits USDA’s roadless rules, they are derived from the Secretary’s delegated organic statutory authorities. The Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. 528-531, establishes multiple-use as the foundation for management of the National Forest System and defines multiple use extremely broadly,

calling for management of the various forest resources “in the combination that will best meet the needs of the American people” (16 U.S.C. 531(a)). Congress has expressly declared “that some land will be used for less than all resources” and “consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output” (16 U.S.C. 531(a.1988)).

Courts have similarly found that the MUSYA grants USDA and the Forest Service “wide discretion to weigh and decide the proper uses within any area” (*Wind-River Multiple Use Advocates v. Espy*, 835 F.Supp. 1362, 1372 (D. Wyo. 1993) (citing *Bighole Ranchers Ass’n v. United States Forest Serv.*, 686 F.Supp. 256, 264 (D. Mont. 1988))). Thus, the Secretary and the Chief of the Forest Service have wide discretion in managing the lands entrusted it and may use “less than all the resources” in certain areas, for example by prohibiting timber harvest and timber harvesting. In *Wyoming v. USDA*, 661 F.3d 1209 (10th Cir. 2011), the Tenth Circuit upheld the legality under MUSYA of the timber harvest and road construction prohibitions imposed by the 2001 Roadless Area Conservation Rule.

As with the Organic Act, the provisions of MUSYA give the Forest Service broad discretion to regulate NFS lands for a wide variety of purposes. See *Perkins v. Bergland*, 608 F.2d 803, 806–07 (9th Cir.1979) (“This language [in 16 U.S.C. 528, 529, and 531]” can hardly be considered concrete limits upon agency discretion. Rather, it is language which ‘breathe(s) discretion at every pore’” (quoting *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir.1975))).

Courts have routinely upheld the Forest Service’s discretion to weigh and choose the proper mix of uses with the National Forest System. See, for example, *Seattle Audubon Soc. v. Lyons*, 871 F.Supp. 1291, 1315 (W.D. Wash. 1991), *aff’d*, 80 F.3d 1401 (9th Cir. 1996) (upholding Forest Service’s designation of large reserves within which

timber harvest is generally prohibited as “an exercise of the Secretary’s multiple use planning responsibilities”); *Sierra Club v. Hardin*, 325 F.Supp. 99, 123 (D. Alaska 1971) (“Congress has given no indication as to the weight to be assigned each value and it must be assumed that the decision as to the proper mix of uses within any particular area is left to the sound discretion and expertise of the Forest Service.”). The rule proposed today is such an exercise of discretionary policy judgment. In addition, as described by the FEIS for the 2020 Alaska Roadless Rule, all of the alternatives analyzed, including Alternative 1 (the no action alternative), satisfied the requirements of the Tongass Timber Reform Act (TTRA). As noted below, the Tongass Timber Reform Act (TTRA) does not require USDA to meet market demand, but only to “seek to . . . meet [.]” such demand, and even that qualified directive is “subject to” applicable law and must be “consistent with” USDA’s authority to provide for the multiple use and sustained yield of renewable forest resources, including recreation, watershed, and wildlife and fish, in addition to timber.

The rationale for the rule proposed today is based on an evaluation of the importance of roadless area conservation for a combination of cultural, social, ecologic and economic values. On January 20, 2021, President Biden ordered all executive departments and agencies to immediately review and, as appropriate and consistent with applicable law, take action to address the promulgation of Federal regulations during the previous four years that may conflict with protecting the environment and to immediately commence work to confront the climate crisis (Executive Order 13990, 86 FR 7037). In addition, on January 26, 2021, President Biden issued a Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships that directs executive departments and Federal agencies to make the following the cornerstones of Federal Indian policy¹: respect for Tribal sovereignty and self-governance, commitment to

¹ <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>

fulfilling Federal trust and treaty responsibilities to Tribal Nations, and regular, meaningful, and robust consultation with Tribal Nations.

Consistent with these Presidential instructions, USDA proposes to repeal the 2020 Alaska Roadless Rule (part 294 of Title 36 of the Code of Federal Regulations Subpart E) and return the Tongass to management under the provisions of the 2001 Roadless Rule, as reinstated by the U.S. District Court for the District of Alaska.

Reinstating application of the 2001 Roadless Rule on the Tongass would prohibit timber harvest and road construction or reconstruction within Inventoried Roadless Areas on the Forest, with the limited exceptions included in the 2001 Roadless Rule and Court Order. Exceptions in the 2001 Roadless Rule were included to allow for some activity, including activity to protect public health and safety, provide access to existing rights or leases including for mining, provide for renewable energy and utility systems, prevent or repair certain natural resource damage, maintain or restore ecosystem characteristics, or improve habitat for certain species.

The original decision rationale for applying the roadless rule to the Tongass in 2001, as described in the response to comments on the final rule on January 12, 2001, stated “the agency has considered the alternatives of exempting and not exempting the Tongass National Forest, as well as deferring a decision per the proposed rule. Social and economic considerations were key factors in analyzing those alternatives, along with the unique and sensitive ecological character of the Tongass National Forest, the abundance of roadless areas where road construction and reconstruction are limited, and the high degree of ecological health.”

Then, and again now, in proposing this action, the agency considered the extraordinary ecological values of the Tongass National Forest and the cultural, social and economic needs of the local forest dependent communities in Southeast Alaska.

USDA believes that this proposed management approach best reflects those multiple values.

From an ecologic perspective, restoring the 2001 Roadless Rule protections on the Tongass would help conserve natural resources by restoring roadless area management on 9.34 million acres, which protects 188,000 acres of forest from potential roadbuilding and would support retention of the largest and most extensive tracts of undeveloped land for the roadless values, watershed protection, and ecosystem health those lands provide. Roadless areas on the Tongass represent the world's largest remaining, intact, old growth temperate rainforest, which supports biodiversity and sequesters carbon. The proposed rule would reflect the Administration's priority on protecting those values.

Restoring the 2001 Roadless Rule protections also reflects the Administration's priorities to build on the region's primary private-sector economic drivers of tourism and fishing. Roadless areas on the Tongass include watersheds and areas important for fishing, hunting, outdoor recreation and tourism, which support revenue and jobs in Southeast Alaska as well as local community well-being. Restoring 2001 Roadless Rule protections to those areas would support those values. This approach is consistent with the Department's *Southeast Alaska Sustainability Strategy* (more about the strategy is available at <https://go.usa.gov/xMNzF>), announced on July 15, 2021, to serve the broader economy of Southeast Alaska, support community resiliency, and conserve the social, cultural, and ecologic values supported by the Tongass.

As outlined below, restoring the 2001 Roadless Rule protections also responds to the January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (www.govinfo.gov/app/details/DCPD-202100091). The proposed rule is directly responsive to unanimous input from Tribal Nations during government-to-government consultation sessions conducted in 2021. Roadless areas on the Tongass are of immense cultural significance for Alaska Native peoples. Restoring application of the

2001 Roadless Rule to the Tongass would reflect the Administration's commitment to strengthening nation-to-nation relationships, and incorporating indigenous knowledge, stewardship and priorities into land management decision-making.

The Administration acknowledges the continued importance of forest products from the Tongass. A number of businesses rely on timber for local community consumption, and wood from the forest also supports cultural uses such as totem poles, canoes and tribal artisan use. Timber harvest and forest products from the Tongass would continue to be provided with the proposed roadless rule's prohibitions in place.

In addition, the Tongass has processed 40 mineral, energy and recreation requests in inventoried roadless areas since the roadless rule was established in 2001, while it has been in effect on the Tongass. This further demonstrates that the 2001 Roadless Rule's exceptions allowing access for existing rights and leases are effective, and that roadless rule prohibitions can coexist with these industries and allow the Forest Service to continue to fulfill its multiple use mission.

Consultation with Indian Tribal Governments and Alaska Native corporations

During development of the 2020 Alaska Roadless Rule on July 30, 2018, the Forest Service invited government-to-government consultation with 32 Alaska Federally recognized Tribes and 27 Alaska Native corporations. Federally recognized Tribes were invited to participate as cooperating agencies during the rulemaking process. Six Tribes initially agreed to become cooperating agencies, including the Angoon Community Association, Central Council Tlingit and Haida Indian Tribes of Alaska, Hoonah Indian Association, Hydaburg Cooperative Association, Organized Village of Kake, and Organized Village of Kasaan.

All six Tribes eventually withdrew as cooperating agencies.

On July 21, 2020, then-Secretary of Agriculture Sonny Perdue received a petition from nine Southeast Alaska Tribal governments requesting that the United States

government commence a new rulemaking in collaboration with Tribal signatories to create a Traditional Homelands Conservation Rule to identify and protect traditional and customary uses of the Tlingit, Haida, and Tsimshian peoples in the Tongass. Since the initial submission of the Traditional Homelands petition, three additional tribes joined as signatories. This petition also requested that USDA create a new process for engaging in consultation with Tribes based on the principle of “mutual concurrence.” The petition states that it was submitted in response to the Tribes’ experience in the 2020 Alaska Roadless Rulemaking process and their belief that their contributions were not being adequately considered.

On May 24, 2021, Secretary Vilsack acknowledged the petition, expressing a commitment to engaging and learning more and inviting formal consultation with Tribal governments. In July 2021, the Department and the Forest Service held a consultation with 10 tribes in Juneau, Alaska. Topics included the petition, the Alaska Roadless Rule and the Southeast Alaska Sustainability Strategy. The Tribes represented at this consultation expressed their desire to return to the 2001 Roadless Rule’s application on the Tongass as quickly and expeditiously as administratively possible.

A second consultation session took place during the week of August 16, 2021, during which the Tribes represented continued to express their interest in seeing action from the Administration to quickly reinstate the 2001 Roadless Rule protections on the Tongass.

The Department and the Forest Service will continue to consult with Tribal Governments and Alaska Native Corporations on this proposed rule.

Relationship of the Alaska Roadless Rules to the Tongass Forest Plan

The 2001 Roadless Rule’s scope and applicability language was designed to avoid conflicts with the rule and forest plans, as well as to avoid unnecessary or duplicative administrative processes for the operation of the 2001 Roadless Rule. As such, the 2001

Roadless Rule expressly directed that the rule did not compel the amendment or revision of any land and resource management plan. See 36 CFR 294.14(b) (2001). When the Tongass Land Management Plan was amended in 2016, the Forest Service elected to directly implement the 2001 Roadless Rule's timber harvesting prohibitions in determining suitability (see 2016 Tongass Land Management Forest Plan (2016 Plan), Appendix A, page A-3, Appendix I, page I-177, indicating all Inventoried Roadless Areas were removed from the suitable land base during Stage 1 of the suitability analysis due to the 2001 Roadless Rule).

As part of the Department's 2020 final rulemaking decision to exempt the Tongass from the 2001 Roadless Rule, the Department directed the Forest Service to issue a ministerial notice of an administrative change to the Tongass Land Management Plan pursuant to 36 CFR 219.13(c), to alter the timber suitability of lands deemed unsuitable solely due to the application of the 2001 Roadless Rule. 36 CFR 294.51. Further, the 2020 rulemaking was clear that administrative change simply provided conformance of the Forest Plan to the final rule in regard to lands suitable for timber production and would not change the level of timber harvest, how timber is harvested on the Tongass, or any other aspects of the Forest Plan. See 85 FR 68695. However, the ministerial administrative change was never issued, and no change has been made to the suitable timber lands designation in the 2016 Plan. Because the timber suitability determination in the 2016 Tongass Land Management Plan was never actually altered pursuant to the 2020 rulemaking, the proposed rule's repeal of the 2020 rulemaking would leave the 2016 Forest Plan's suitability determination undisturbed and operational going forward.

Conclusion

The stated purposes of the 2001 Roadless Rule included retention of the largest and most extensive tracts of undeveloped land for the roadless values of watershed

protection and ecosystem health that these lands provide. The Department and Administration believe that the underlying goals and purposes of the 2001 Roadless Rule continue to be important, especially in the context of the values that roadless areas on the Tongass represent for local communities and Native peoples, and the multiple ecologic, social, cultural and economic values supported by roadless areas on the Forest. Once again, the USDA believes that the long-term benefits to the nation of conserving inventoried roadless areas on the Tongass outweigh the potential benefits associated with the Tongass no longer being subject to the 2001 Roadless Rule. USDA believes, considering the FEIS for the 2020 Alaska Roadless Rulemaking, which analyzed the continued implementation of the 2001 Roadless Rule as Alternative 1, that a policy change for the Tongass can be made without significant adverse impacts to the timber and mining industries, while providing benefits to the recreation, tourism and fishing industries. This change would also respond to input from Alaska Tribal Nations and reflect cultural benefits associated with conserving roadless areas on the Tongass.

Therefore, USDA proposes to repeal Subpart E and return roadless management on the Tongass to the regulatory regime previously in force, which would result in the reinstatement of the 2001 Roadless Rule as provided for in the U.S. District Court for the District of Alaska's Judgment in *Organized Village of Kake v. USDA*, 1:09-cv-00023 JWS (D. Alaska filed May 24, 2011).

Regulatory Certifications

National Environmental Policy Act

Preliminary Determination of NEPA Adequacy: The Forest Service's preliminary determination is that the FEIS issued in association with promulgation of Subpart E (85 FR 68688) adequately analyzes the environmental effects of this proposed rule and reasonable alternatives. The FEIS is available at:

www.fs.usda.gov/nfs/11558/www/nepa/109834_FSPLT3_5357355.pdf. The

environmental effects associated with adoption of the proposed rule were analyzed and disclosed in detail in Alternative 1 of the FEIS for the 2020 Alaska Roadless Rule (the no action alternative).

The FEIS for the 2020 Alaska Roadless Rule was prepared less than one year ago and included an effects analysis for six alternatives covering a broad range of roadless management options, including both operation under, and exemption from, the 2001 Roadless Rule's prohibitions. The Forest Service's preliminary determination of NEPA adequacy is based upon the criteria outlined at 36 CFR 220.4(j) as applied to the 2020 rule and the proposed rule: (1) the federal action proposed in this rulemaking is identical to the federal action described and analyzed in detail in Alternative 1 in the FEIS for the 2020 Alaska Roadless Rule; (2) the range of alternatives analyzed in the FEIS for the 2020 Alaska Roadless Rule is appropriate with respect to this proposed rulemaking and comparable with the alternatives considered during the 2001 roadless rulemaking and its Final EIS (as noted above, the FEIS for the 2020 Rule included six alternatives covering a broad range of roadless management options); (3) there appears to be no materially relevant new information or circumstances relevant to environmental concerns that would substantially change the environmental analysis disclosed in the FEIS for the 2020 Alaska Roadless Rule; and (4) the environmental effects associated with implementing the proposed rule are not different than, and are effectively identical to, those analyzed in Alternative 1 in the FEIS for the 2020 Alaska Roadless Rule.

A final NEPA determination will be made in association with the final rule and the public may submit as part of its comments on the rulemaking any supporting or contrary views concerning environmental effects.

Regulatory Planning and Review

This rulemaking is a significant regulatory action as it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set

forth in Executive Order 12866. The Forest Service has prepared an analysis of potential impacts and discussion of benefits and costs of the proposed rule in its Regulatory Impact Analysis. By removing Subpart E, the proposed rule would return the Tongass to management under the provisions of the 2001 Roadless Rule, which prohibits timber harvest and road construction or reconstruction within designated Inventoried Roadless Areas with limited exceptions. Exceptions in the 2001 Roadless Rule do allow for some activity, including to protect public health and safety, provide access to existing rights or leases, prevent or repair natural resource damage, maintain or restore ecosystem characteristics, or improve habitat for certain species.

Protection of roadless characteristics through reinstatement of the 2001 Roadless Rule that would occur as a result of this proposed rule would provide benefits associated with old-growth conservation and would avoid displacement-related losses to recreationists and the outfitter and guide industry, estimated to be \$68,000 to \$224,000 annually. Estimated loss of suitable old growth would not decrease timber related jobs, income or output, since the proposed rule does not change the timber sale quantity or timber demand projections from the Tongass Land and Resource Management Plan.

The Tongass, in compliance with the Tongass Timber Reform Act (TTRA), has long acknowledged that the TTRA directs the Forest Service, subject to other applicable laws, to “seek to meet market demand” for timber from the Tongass National Forest. See 66 Fed. Reg. at 3255. However, as USDA (and the courts) have repeatedly explained, the TTRA “does not envision an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation.” *Id.* The TTRA expressly declares that subject to appropriations, other applicable law, the requirements of the National Forest Management Act; and to the extent consistent with providing for the multiple use and sustained yield of all renewable forest resources, the Forest Service is to “seek to provide a supply of timber from the Tongass, which: (1) meets the annual market demand for

timber from such forest and (2) meets the market demand from such forest for each planning cycle” (16 U.S.C. 539d).

While the TTRA provides a qualified instruction that USDA “seek to provide a supply of timber” from the Tongass that meets market demand, nothing on the face of the 2001 Roadless Rule prevents USDA from seeking to meet market demand through timber sales on lands outside of inventoried roadless areas or consistent with Roadless Rule exceptions, even if operation of the rule would make it more difficult to meet market demand in light of other market factors. The TTRA does not require USDA to meet market demand, but only to “seek to . . . meet []” such demand. Even that qualified directive is “subject to” applicable law and must be “consistent with” USDA’s authority to provide for the multiple use and sustained yield of renewable forest resources, including recreation, watershed, and wildlife and fish, in addition to timber. The proposed rule is fully consistent with TTRA’s aspirational directive.

Stumpage value changes are quantified in the regulatory impact analysis, alongside agency road maintenance costs, conservation value, avoided lost revenue to outfitters and guides, and value of access by recreationists not using outfitters and guides. Discounted upper bound estimates of net present value are positive for the proposed rule and regulatory alternatives.

Regulatory Flexibility Act and Consideration of Small Entities

USDA certifies that the proposed rule does not have a significant economic impact on a substantial number of small entities as determined in the Regulatory Flexibility Analysis because the proposed rule does not directly subject small entities to regulatory requirements. Therefore, notification to the Small Business Administration's Chief Council for Advocacy is not required pursuant to Executive Order 13272. A number of small and large entities may avoid revenue losses as a result of the proposed

rule, or otherwise benefit from activities on National Forest System lands under the proposed rule.

Paperwork Reduction Act

This proposed rule does not require any additional record keeping, reporting requirements, or other information collection requirements as defined in 5 CFR part 1320 that are not already approved for use and, therefore, imposes no additional paperwork on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Regulatory Risk Assessment

A risk assessment is only required under 7 U.S.C. 2204e for a “major” rule, the primary purpose of which is to regulate issues of human health, human safety, or the environment. The statute (Pub. L. 103-354, Title III, Section 304) defines “major” as any regulation the Secretary of Agriculture estimates is likely to have an impact on the U.S. economy of \$100 million or more as measured in 1994 dollars. Economic effects of the proposed rule are estimated to be less than \$100 million per year.

Federalism

USDA has considered the proposed rule in context of Executive Order 13132, Federalism, issued August 4, 1999. USDA has determined that the proposed rule conforms with Federalism principles set out in Executive Order 13132, would not impose any compliance costs on any state, and would not have substantial direct effects on states, on the relationship between the national government and the State of Alaska, or any other state, nor on the distribution of power and responsibilities among the various levels of government. Therefore, USDA concludes that this proposed rule does not have Federalism implications. USDA has considered the proposed rule in the context of the

public comment received during the Forest Service's previous public comment periods and previous input received from cooperating agencies.

No Takings Implications

USDA has considered the proposed rule in context with the principles and criteria contained in Executive Order 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*, issued March 15, 1988. USDA has determined that the proposed rule does not pose the risk of a taking of private property because it only applies to management of National Forest System lands and contains exemptions that prevent the taking of constitutionally protected private property.

Consultation with Indian Tribal Governments

The proposed rule was reviewed in accordance with the requirements of Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*. Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments, or proposed legislation, and other policy statements or actions that may have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. In Alaska, the Forest Service is also required to consult with Alaska Native corporations on the same basis as Federally recognized tribes.

In support of the January 26, 2021 Executive Order 13175 and the President's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, in July 2021, USDA and the Forest Service held a consultation with 10 tribes in Juneau, Alaska. The tribes represented at this consultation expressed their desire to return to the 2001 Roadless Rule as quickly and expeditiously as administratively possible. USDA committed to continuing meaningful consultation throughout the rulemaking.

Civil Justice Reform

USDA reviewed the proposed rule in context of Executive Order 12988. USDA has not identified any state or local laws or regulations that conflict with the proposed rule or would impede full implementation of the rules. However, if the rule is adopted, all state and local laws and regulations that conflict with this proposed rule or would impede full implementation of this proposed rule would be preempted. No retroactive effect would be given to this proposed rule, and the proposed rule would not require the use of administrative proceedings before parties could file suit in court.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), signed into law on March 22, 1995, USDA has assessed the effects of the proposed rule on state, local, and tribal governments and the private sector. The proposed rule does not compel the expenditure of \$100 million or more by any state, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

Energy Effects

USDA has considered the proposed rule in context of Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use, issued May 18, 2001. USDA has determined the proposed rule does not constitute a significant energy action as defined in Executive Order 13211. Therefore, a statement of energy effects is not required.

E-Government Act

USDA is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to government information and services, and for other purposes.

List of Subjects in 36 CFR Part 294

National Forests, Recreation areas, Navigation (air), Roadless area management.

For the reasons set forth in the preamble, USDA proposes to amend part 294 of Title 36 of the Code of Federal Regulations as follows:

PART 294 – SPECIAL AREAS

1. The authority citation for part 294 continues to read as follows:

Authority: [16 U.S.C. 472](#), [551](#), and [1131](#).

Subpart E – [Removed]

2. Subpart E, consisting of §§ 294.50 and 294.51, is removed.

Dated: November 17, 2021.

Meryl Harrell,

*Deputy Under Secretary,
Natural Resources and Environment.*

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